classified all carriers in one of two "buckets," dominant and non-dominant, and it proceeded to fashion policies and rules that took into account these two classifications. And, although the Commission extended deregulation somewhat gradually, and even selectively, to subclasses of carriers within those two broad classifications, it never has wavered from the "two-tiered regulatory structure" it originally adopted; that is, its dominant/non-dominant classification scheme, characterized by the presence or absence of market power, has held firm since its adoption in 1980 in the First Report and Order in Competitive Carriers.

Even were the Commission to seek to subclassify non-dominant carriers on some basis and to differentiate its regulation among them, such as facilities-based versus resale, there would appear to be no legal or rational basis to support a determination that the forbearance rule should apply to one class of non-dominant carriers, as distinct from others. Thus, a determination in this proceeding that all carriers are obliged to file tariffs should apply to all carriers, not just some.[24/]

[24/] Also, it goes without saying that entities engaging exclusively in "private carriage" would not need to file tariffs in connection with their offerings because the offerings are beyond the reach of the Communications Act. Nor would carriers transacting with other carriers "in relation to any traffic affected by the provisions of [the Act]" need to file tariffs for those offerings. See Section 211(a) of the Act; Section 43.51 of the Commission's Rules and Regulations.

III. IF THE COMMISSION'S CURRENT FORBEARANCE RULE IS FOUND TO BE UNLAWFUL, THEN ALL CARRIERS SHOULD BE REQUIRED TO FILE TARIFFS ONLY FOR THEIR NEW OFFERINGS

If the Commission were to decide at this late date that non-tariffing by non-dominant carriers is impermissible under the Communications Act and that, accordingly, such carriers had to file tariffs, that decision should have only prospective, not retrospective, applicability and effect. This means that existing business arrangements entered into between non-dominant carriers and their customers on a contractual basis should be allowed to expire, according to their terms, pursuant to the terms of the contracts. No tariff should be required for such existing business arrangements.

Plainly, carriers not filing tariffs over the past ten years cannot be found to have acted unlawfully in following Commission policies, and a requirement to tariff should not be reached or, for that matter, viewed as a punitive measure against wrongdoers.[25/] In this regard, the Commission expressly found when it first adopted its forbearance rule for non-dominant carriers that, if any carrier abused its status in the

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[25/] See AT&T v. MCI, supra n.2, at ¶ 13, citing Arizona Grocery v. Atchison, Topeka and Santa Fe Railway Co., 284 U.S. 370, 389 (1932); Nader v. FCC 520 F.2d 182, 202-203 (D.C. Cir. 1975); Bowen v. Georgetown University Hospital, 109 S.Ct. 468, 480 (1988); NLRB v. Majestic Weaving Co., 355 F.2d 854 (2d Cir. 1966); International Union, United Automobile, Aerospace & Implement Workers of America v. Brock, 783 F.2d 237 (D.C. Cir. 1986).

marketplace, the Commission would take appropriate prospective action.[26/]

Thus, in reasonable reliance on long-standing Commission policies, non-dominant carriers and their customers entered into contractual relationships that neither expected would need to be tariffed, and that expectation should not be compromised now by any contrary rule seeking to have retrospective application.

As the Supreme Court explained in Lemon v. Kurtzman:

> [S]tatutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity.

411 U.S. 192, 199 (1973).[27/] The same rule against retroactive application of statutes applies to agency regulations,[28/] and in his concurring opinion in Bowen v. Georgetown University Hospital, Justice Scalia indicated that a rule "altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule -- may for

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[26/] See Competitive Carriers, Second Report and Order, 91 F.C.C.2d at 70. ("...(W)e retain the power to reimpose...tariffing requirements should the need arise.") (Emphasis supplied.)

[27/] In that case a state statute had been ruled unconstitutional and the appellants wanted to apply the ruling retroactively to deprive those who had previously acted in reliance on the statute from receiving benefits under the statute. The Court held that those who had taken action in reliance on the statute were entitled to the benefit of that reliance, and that even though the statute had been declared unconstitutional, the striking down of the statute could not be applied retroactively.

[28/] Greene v. United States, 376 U.S. 149, 160 (1964).

that reason be 'arbitrary or capricious' and thus invalid." 488 U.S. 204, 220 (1988).

Consistent with this Supreme Court precedent, the U.S. Court of Appeals for the District of Columbia Circuit has explained that "[a]lthough an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that when it decides to reverse its course, it must give notice that the standard is being changed ... and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect." RKO General, Inc. v. FCC, 670 F.2d 215, 223-24 (D.C. Cir. 1981) (quoting Boston Edison Co. v. FPC, 557 F.2d 845, 849 (D.C. Cir. 1977)), cert. denied, 456 U.S. 927 (1982).

The Commission has recognized this obligation to avoid retroactive rulemaking in previous orders. For instance, in MCI v. AT&T, 74 FCC 2d 184 (1979), the Commission refused to apply its Resale and Shared Use decision to AT&T conduct that occurred prior to the issuance of the decision. The Commission explained that while it had "concluded that restrictions on resale and shared use were violative of Sections 201(b) and 202(a) of the Communications Act," since AT&T's action of restricting resale occurred prior to the announcement of that policy, "it would be unfair to give Resale and Shared Use retroactive application because the findings of unlawfulness are related to a determination of new policy." 74 FCC 2d at 193-194. See, Also Exchange Network Facilities for Interstate Access, 1 FCC Rcd 618,

629 (186) (refusing to grant relief that "would constitute retroactive rulemaking, to the inequitable detriment of the OCCS who relied upon" prior Commission policies). Likewise, under the present circumstances, the Commission clearly would be empowered under Sections 203(b)(2) and 4(i) of the Act and well-established precedent to require the filing of tariffs covering only prospective, as distinct from then-current, business relationships.

IV. IF THE COMMISSION'S CURRENT FORBEARANCE RULE IS FOUND UNLAWFUL, THAT DECISION WOULD HAVE DRAMATIC IMPACT ON COMPETITION IN THE INTERSTATE INTEREXCHANGE MARKETPLACE

The Commission, based upon a supposition that its current forbearance rule is unlawful, asks a number of questions with a view toward ascertaining how that determination would affect the interstate interexchange marketplace. It seems obvious, given the Commission's determination in its NPRM that "[f]ew, if any of these [more than 400 non-dominant] carriers file tariffs for all of their service offerings, and most do not file any tariffs at all,"[29/] that there would be a dramatic impact in the marketplace. And, unless it were possible to conclude that today's marketplace suffers from serious deficiencies that could be cured by a finding that the forbearance rule is unlawful, it seems evident that such a finding might inflict serious injury on the growth of effective marketplace competition.

29/ NPRM at para. 3.

In view of the foregoing, MCI offers the following in response to the several, hypothetical "what if" questions raised by the Commission in its NPRM:

A. Other Rule Changes -- It does not appear to MCI that any substantive rule changes would be necessary following any determination that the forbearance rule is unlawful.[30/] Presumably, carriers subject today to forbearance regulation would be subject to regulation as "non-dominant" carriers subject to "streamlined regulation" under the Commission's rules and regulations.[31/]

B. Additional Streamlining for Forbearance Carriers -- It is difficult to grasp what "additional streamlining" might be extended to carriers currently subject to the forbearance rule. Non-dominant carriers subject today to "streamlined regulation," as well as AT&T -- a dominant carrier under Commission policies, have been substantially deregulated by the Commission.[32/]

30/ Although there may be other provisions of its rules that reference "forbearance" or "forborne carriers," the only instance MCI has located appears at Section 43.51(a) of the Rules ("regulatory forbearance policies").

31/ See, e.g., Section 61.3(s) of the Commission's Rules and Regulations.

32/ For AT&T, none of its "Basket 3" services other than analog private line is reviewed or evaluated by the Commission on either a cost or price basis. And although AT&T must continue to tariff those offerings on 14-days notice, there is a strong presumption of their lawfulness, which makes it virtually impossible to challenge them, no matter how objectionable they

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Thus, the only conceivable approach the Commission might take would be to reduce still further the 14-day notice requirement pertaining to tariff filings.

C. Effect of "Re-regulation" on Competition -- The result of a Commission determination that it could no longer allow carriers subject to forbearance regulation not to file tariffs would be their effective "re-regulation." Apart from the fact that "regulation" and, most certainly, "re-regulation" is anathema to this Commission and the current Administration,[33] MCI believes that such an outcome would have an adverse effect on the development of further competition in the interstate interexchange marketplace.

Thus, for example, smaller interexchange carriers, which have elected to transact exclusively by contract rather than tariff, would need to re-order their business relationships with their customers and incur the costs associated with filing and maintaining tariffs with the Commission. Although others likely to participate in this proceeding can better speak to this

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[32] (...continued)
may be. The same is true of AT&T's "contract-carriage" offers, which are "individually negotiated contracts" that are not generally available in the marketplace due to restrictions that improperly limit their appeal, and thus their availability, to other than those for whom they were intended.

[33] Chairman Sikes recently indicated in another context that he would "oppose legislation aimed at...'re-regulating' the many non-Bell phone company information service operations that now exist." Summary of Statement of FCC Chairman Alfred C. Sikes Regarding Telecommunications Industry Competition Policy, dated March 18, 1992 at 10.

matter, it is conceivable that this additional cost would so impact profit margins that some would be forced out of the market and others would be dissuaded from entering it.[34/] This clearly would be an undesired consequence of the "re-regulation" of entities found by the Commission nearly a decade ago -- and by marketplace experiences since that time -- to be incapable of inflicting any harm on competition. It would represent the very kind of Government intrusion that the Administration and the Chairman of the Commission are seeking to avoid.

Finally, revelation on the public record of non-dominant carrier pricing and price-related terms and conditions could well lead to a diminution in competition because of the widespread public knowledge of each competitor's prices. While competition likely would remain intense in the areas of product feature enhancement and availability and in matters related to "customer service," it seems obvious that price competition would be somewhat diminished if 400-plus carriers are obliged to publicly reveal their prices and price changes.[35/]

[34/] In an analogous circumstance, the Common Carrier Bureau determined that its regulation of billing and collection "may provide disincentives to competitive billing and collection providers." Memorandum Opinion and Order, In the Matter of AT&T 900 Dial-It Services and Third Party Billing and Collection Services, 4 FCC Rcd 3429, 3433 (1989).

[35/] Some doubtless will contend that the public filing of common carrier prices is what the Act requires and, further, that such filing is essential to prevent price discrimination. However, they forget, among other things, that when the Act was passed, there was a de facto monopoly provider of interstate voice services, and there were only two providers of interstate message services. Thus, the background for the enactment of

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In view of the foregoing, it is impossible to find and conclude that the public interest in the further development of competition in the interexchange services marketplace would be served by the "re-regulation" of carriers currently subject to the forbearance rule. Finally, MCI submits that, if the Commission decides that it does not possess the authority to continue with its forbearance rule for non-dominant carriers and that it must "re-regulate" them, it is essential that it undertake to reimpose an appropriate level of additional regulation on AT&T. It would be patently untenable for the Commission to treat AT&T and non-dominant carriers similarly when AT&T is still viewed by the Commission -- quite correctly -- as "dominant." Thus, the re-regulation of non-dominant carriers, coupled with the level of regulation imposed today on the dominant carrier, would be arbitrary and capricious in the extreme. At a minimum, therefore, the reimposition of tariff regulation on non-dominant carriers must be accompanied by the re-regulation of AT&T, at least to the level it was being regulated before the Commission's decision in Interexchange Competition. Only then could there remain a rational basis to differentiate between dominant and non-dominant carriers.

35/ (...continued)
Section 203 was an environment that has not existed in interexchange telecommunications for more than a decade now. Moreover, as the Commission has found in Competitive Carriers, non-dominant carriers lack market power and are incapable of engaging in unlawful discrimination under Section 202(a) of the Act.

V. CONCLUSION

For all the reasons set forth herein, the Commission should find and conclude that it possesses the authority to continue with its forbearance rule for application to common carriers lacking market power.

Respectfully submitted,

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